LIBRARY
SUPREME COURT, U. S

Office-Supreme Court, U.S.
FILED
APR 3 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 969

NELSON BRYANT, et al.,

Petitioners,

v.

CHARLES K. MOORE, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

SCOTT H. RAY, JR.
8 S. Broadway
Lebanon, Ohio

LOUIS C. CAPELLE
505 Walnut Street
Cincinnati, Ohio
Attorneys for Petitioners

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

INDEX

	PAGE
I. Opinions Below	1
II. Jurisdictional Statement	1
III. Questions Presented	2
IV. Statutes and Constitutional Provisions Involved	4
A. Constitutional Provisions	4
1. Federal	4
2. State	4
B. Statutes of the State of Ohio	5
C. Rules of Court, Common Pleas Court of Warren County, Ohio	8
Rule 2: Assignment of Cases for Trial	8
Rule 22: Motion Days	8
Rule 10: Motions and Demurrers	9
V. Statement of the Case	9
VI. Federal Questions Raised at First Opportunity	13
VII. Argument for the Allowance of This Petition for Writ of Certiorari	14
A. An Issue of Substance Not Previously Determined by This Court	14
B. The Decision of the Trial Court Contravenes Applicable Principles of Due Process	15
VIII. Conclusion	19
IX. Prayer	19
Appendix A	1a
Appendix B	2a
Appendix C	4a
Appendix D	5a
Appendix E	6a

TABLE OF CASES

PAGE

Aero Design and Engineering Co. v. Oklahoma Employment Sec. Commission, D. C. Okla. 1956, 151 F. Supp. 844 affirmed. 353 U. S. 943, 77 S. Ct. 824, 1 L. Ed. 2nd 855 17

Calif. v. Pacific Gas & Electric Co., Cal. 1938, 30 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319 17

Cox v. Armour Fertilizer Co., Fla. 1915, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027 17

Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 689 16

Hallinger v. Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986 16

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530 16

Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884) 16

In re: American Rio Grande Land and Irrigation Co., D. C. Tex. 1937, 21 F. Supp. 492 Cert. Denied 308 U. S. 573, 60 S. Ct. 88, 84, L. Ed. 481 17

Pink v. A. A. A. Hwy. Express, 1941, 191 Ga. 302 Affirmed 314 U. S. 201, 62 S. Ct. 241, 86 L. Ed. 142 17

Snyder v. Mass, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674 17

Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921) 16

Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908) 15

Akron v. Chapman, 160 O. S. 382 18

Ex Parte Martin, 1942, 139 O. S. 609, 41 N. E. 2nd 702 17

PAGE

Lyons v. Goldstein, 290 N. Y. 19 17

McCollum v. Birmingham Post Co., 1953, 259 Ala. 88 17

State v. Henry, 37 N. M. 536; 25 P. 2nd 204 16

U. S. CONSTITUTION

Fourteenth Amendment 4

OHIO CONSTITUTION

Article I, Section 16 4

Article II, Section 21 4

STATUTES

United States Code Title 28, Chapter 81, Section 1257 (3) 2

Ohio Revised Code Sections

2309.43 7
2317.07 7
3515.08 15
3515.09 5
3515.10 5
3515.11 6
3515.15 6
3515.16 15
4301.32 through 4301.41 10

Identification of the parties: Throughout this petition, the parties are designated as they were in the courts below:

Petitioners: Contestors-Appellants
Respondents: Contestees-Appellees

IN THE

Supreme Court of the United States

No. _____

NELSON BRYANT, et al., *Petitioners,*

v.

CHARLES K. MOORE, et al., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

I. OPINIONS BELOW

There are no reported opinions below. The matter was dismissed without a trial on the merits. The Common Pleas Court of Warren County, Ohio, filed a written decision in the case which is appended hereto and denominated Appendix A.

The Ohio Supreme Court denied the Motion for Leave to Appeal and the Application for Rehearing without opinion.

II. JURISDICTIONAL STATEMENT

The Contestors-Appellants seek review of the decision of the Common Pleas Court of Warren County, Ohio, of April 9, 1963, and the subsequent entries of dismissal and entries overruling Contestors-Appellants' Motion to Vacate the Entries of Dismissal. The last Entry of the Court of

Common Pleas, the Entry overruling Contestors-Appellants' Motion to Vacate, was filed and journalized on the 12th day of June, 1963. The dates of the entries and motions intervening between April 9, 1963, and June 12, 1963, are specifically set forth in the Statement of the Case below.

Further, Contestors-Appellants seek review of the Decision of the Ohio Supreme Court refusing review of the proceedings of the court below. The form entries denying the Motion for Leave To Appeal and the Motion for Rehearing were journalized December 11, 1963, and January 22, 1964, respectively.

This appeal is being brought before the United States Supreme Court upon Writ of Certiorari by virtue of the provisions and authorities contained in Section 1257 (3) Chapter 81, Title 28 of the United States Code, which provides for institution of the appellate procedure by Writ of Certiorari in cases where the validity of a state statute is drawn into question on the grounds of its being repugnant to the Constitution or the Laws of the United States or where any right, privilege, or immunity is specifically set up or claimed under the Constitution or laws or commission held by or exercised under the United States.

III. QUESTIONS PRESENTED

1. The Question: May a state trial court summarily deny to a party his right to his day in court to contest an election, the result of which election if found to be valid would deprive said party of a privilege granted by the state to said party to engage in a lawful occupation?

The Court: The judge of the Common Pleas Court of Warren County, Ohio, held that it could deny the party his right to his day in court when the trial of the issues is not obtained within the period limited by statute.

The Appellant: Contestors-Appellants state that they did every thing within their power to secure a trial on the

issues within the time limited by statute and that the actions of the trial court and the Contestees-Appellees rendered this impossible and that the summary dismissal of the action to contest the election without a trial on the issues constitutes a deprivation of Substantive and Procedural Due Process of Law guaranteed under the Fourteenth Amendment of the Constitution of the United States of America.

2. The Question: May a state trial court abrogate the right of an aggrieved party to contest a local option election by protracting the pleading stage then dismissing the contest for failure to have a trial of the issues within the time limited by statute?

The Court: The Common Pleas court of Warren County, Ohio, journalized its Entry permitting the contestees the use of interrogatories 38 days after the expiration of time for a trial of issues as said time is limited by the statute.

The Appellant: Contestors-Appellants state that the trial courts action in dismissing the election contest for failure to secure a trial within the time limited by statute when the court itself authorized proceedings beyond said period, is unreasonable and contravenes Contestors-Appellants' right to Due Process.

3. The Question: May the court of last resort of a state judicially reduce the right of appeal granted by statute?

The Court: The Ohio Supreme Court required the Contestors-Appellants to seek review under a procedure denominated a Motion For Leave To Appeal. The court denied the motion and ignored the issue raised by Contestors-Appellants that they were appealing as of right. No reason was stated by the Ohio Supreme Court for denying the Motion or for ignoring Contestors-Appellants argument that the appeal was a matter of right.

The Appellants: The Ohio Revised Code grants to an aggrieved party in an Election Contest the right to appeal to the Ohio Supreme Court. The statutory authority to

grant said right is founded in the Constitution of the State of Ohio. The Ohio Supreme Court is without power to modify or in any way abridge said right of appeal. It is mandatory for the Ohio Supreme Court to admit Contestors-Appellants appeal and to grant them a full hearing on the merits and to do otherwise is to deny the Contestors-Appellants their full protection under the Constitution by Due Process of Law.

IV. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Constitutional Provisions

1. FEDERAL

The Fourteenth Amendment of the United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. STATE

Article I, Section 16, of the Constitution of the State of Ohio:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered *without denial* or delay. (Emphasis added)

Article II, Section 21, of the Constitution of the State of Ohio:

> The general assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted.

B. Statutes of the State of Ohio

Ohio Revised Code, Section 3515.09:

Filing contest petition.

A contest of election shall be commenced by the filing of a petition with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election for or against a candidate for the office or for or against the issue being contested, or by the defeated candidate for said nomination or election, within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority, or if there is a recount, within ten days after the results of the recount of such nomination or election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, or by the oath of the defeated candidate filing the petition, and shall set forth the grounds for such contest.

Said petition shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest. The contestor and the person whose right to the nomination or election to such office is being contested, to be known as the contestee, shall be liable to the officers and witnesses for the costs made by them respectively; but if the results of the nomination or election are confirmed or the petition is dismissed or the prosecution fails, judgment shall be rendered against the contestor for the costs; and if the judgment is against the contestee or if the results of the nomination or election are set aside, the county shall pay the costs as other election expenses are paid.

Ohio Revised Code, Section 3515.10:

Court shall fix time for trial.

The court with which a petition to contest an election is filed shall fix a suitable time for hearing such

contest; which shall be not less than fifteen nor more than thirty days after the filing of the petition. Such court shall have a copy of contestor's petition served upon the contestee or upon the chairman of the committee taking the other side in advocacy of or opposition to any issue, in the same manner as a summons in a civil action. The contestee shall have ten days from the time service has been made upon him in which to answer the petition, and the contestor shall have five days in which to reply to the answer of the contestee. All parties may be represented by counsel and the hearing shall proceed at the time fixed, unless postponed by the judge hearing the case for good cause shown by either party by affidavit or unless the judge adjourns to another time, not more than thirty days thereafter, of which adjournment the parties interested shall take notice.

Ohio Revised Code, Section 3515.11:

Trial proceedings.

The proceedings at the trial of the contest of an election shall be similar to those in judicial proceedings, in so far as practicable, and shall be under the control and direction of the court which shall hear and determine the matter without a jury, with power to order or permit amendments to the petition or proceedings as to form or substance. Such court may allow adjournments for not more than thirty days, for the benefit of either party, on such terms as to costs and otherwise as seem reasonable to the court, the grounds for such adjournment being shown by affidavit. The hearing shall proceed expeditiously and the total of such adjournments shall not exceed thirty days after the date set for the original hearing.

Ohio Revised Code, Section 3515.15:

Appeal on questions of law to supreme court.

The person against whom judgment is rendered in a contest of election may appeal on questions of law, within twenty days, to the supreme court; but such

appeal shall not supersede the execution of the judgment of the court. Such appeal takes precedence over all other causes upon the calendar, and shall be set down for hearing and determination at the earliest convenient date. The laws and rules of the court governing appeals apply in the appeal of contested election cases. If the judgment of the lower court is affirmed, the supreme court shall order the judgment of such lower court to be enforced, if the party against whom the judgment is rendered is in possession of the office.

Ohio Revised Code, Section 2309.43:

Annexing interrogatories to pleadings.

A party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issue made in the pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath by the party to whom they are propounded, or if such party is a corporation, by the president, secretary, or other officer thereof, as the party propounding requires.

Ohio Revised Code, Section 2317.07:

Written interrogatories; corporation officers may be examined.

At the instance of the adverse party, a party may be examined as if under cross-examination, orally, by way of deposition, like any other witness, by way of written interrogatories filed in the action or proceeding pertinent to previous pleadings of such party, or by any one or more of such methods. Unless demurred to or otherwise ordered by the court, each of such written interrogatories shall be plainly and fully answered in writing under oath within thirty days. No party may, without leave of court, file more than one set of interrogatories to be answered by the same witness. If the party is a corporation, any or all of the officers thereof may be so examined at the instance of the adverse party. The party calling for such exam-

ination shall not thereby be concluded but may rebut it by evidence.

C. Rules of Court, Common Pleas Court of Warren County, Ohio

Rule 2: Assignment of Cases for Trial.

All civil cases which come to issue shall be placed by the Assignment Commissioner upon the trial calendar immediately upon the joining of the issue, or issues, between the parties, and shall come on for trial thereafter in their numerical order. For the purpose of default judgments, civil cases shall, as to the affected parties, be considered as placed upon the trial calendar immediately upon default, and shall be available for trial out of order forthwith.

The Clerk of Courts shall notify counsel in all cases set for trial, at least 30 days in advance of such setting, by mail. Cases shall be noted for trial in the official publications of the Court not less than 10 days, and not more than 30 days, before the trial date.

Rule 22: Motion Days.

Each Wednesday, beginning at 9:00 A.M. before the Court proceeds with the regular assignments, judgments by default and orders not requiring trial or argument will be entered by the Court, but for good cause shown, the Court will permit such entries to be made at any other time when it can be done without interrupting the business of the Court.

Each Wednesday beginning at 9:00 A.M. before the Court proceeds with the regular assignments, in addition to the matters set forth above, all motions and demurrers will be considered and arguments thereon heard, as provided in Rule 10.

Each Saturday morning, beginning at 9:00 A.M. before the Court proceeds with the regular assignments, temporary alimony hearings and uncontested divorce and alimony hearings shall be had, and the

Court will not permit such hearings at any other time except for good cause shown.

Rule 10: Motions and Demurrers.

Except in the case of motions for a new trial and formal motions, such as the granting of interlocutory relief, issuing of process or notices, and similar matters, there shall be filed with each motion or demurrer, a memorandum stating the grounds upon which the said motion or demurrer is based, with a citation of the authorities relied upon to sustain the same. Such memorandum shall appear upon the same document upon which appears the motion or demurrer. A copy of said motion or demurrer and memorandum shall be mailed to or served upon all opposing counsel on the day said motion or demurrer is filed. For failure to comply with this rule, such motion or demurrer shall be stricken from the files at the cost of the party filing the same.

All motions and demurrers shall be in writing, except such motions as may be made during the trial or the hearing of the cause.

All motions and demurrers shall be set down forthwith for hearing and the party or parties appearing shall be privileged to argue said motion or demurrer. The Clerk shall, for each week ending on Saturday, keep a list of the motions and demurrers filed during that week, and shall enter each motion and demurrer on said list immediately on its being filed. All such motions and demurrers shall be for hearing on the second Wednesday after such Saturday and notice of such hearing shall be published in the Western Star and the Franklin Chronicle in advance of such hearing. If the party filing said motion or demurrer fails to appear, said motion or demurrer shall be considered by the Court as if submitted upon briefs.

V. STATEMENT OF THE CASE

A local option election was held in South Lebanon, Ohio, on the 6th day of November, 1962, to determine whether

or not the electorate of the village desired to discontinue lawful trafficking in alcoholic beverages within the corporation limits. Elections of this nature are authorized by Sections 4301.32 through 4301.41, of the Ohio Revised Code.

The officially tabulated results of the voting indicated that the majority of the electorate preferred prohibition against lawful trafficking in alcoholic beverages in the Village of South Lebanon, Ohio.

The Contestors-Appellants alleged that the results were incorrect and demanded a recount. The recount did not change the result. However, the Contestors-Appellants contested the results of the election on the following grounds:

1. That certain votes were cast for prohibition by persons not having the qualifications of electors of said village, which votes were counted.

2. That certain ballots were counted at the recount as being for prohibition which ballots were not properly marked and should not have counted as being votes for prohibition.

3. That the persons favoring prohibition and who caused the election to be held did violate the Ohio Corrupt Practices Act and thereby vitiated the election result.

4. That the Local Option Laws authorizing the election are unconstitutional and the election therefore was a mere nullity.

Sufficient ballots were challenged and at issue to change the result of the election.

In support of their position the Contestors-Appellants took the following steps in proceedings below:

1. Application for Recount filed November 13, 1962, by the contestors.

2. November 14, 1962, the Warren County Board gave notice of the application for recount.

3. November 20, 1962 recount held in the presence of contestors and contestees and their counsel.

4. Petition to contest the election filed November 30, 1962, by the contestors.

5. Entry ordering service on contestees and setting the election contest for trial on December 19, 1962, filed December 3, 1962, at the behest of contestors.

6. Service of petition and entry setting election contest for trial served and returned December 5, 1962.

7. Answer with interrogatories annexed filed December 18, 1962, by contestees.

8. Demurrer to interrogatories filed December 18, 1962, by contestors.

9. Hearing date of December 19, 1962, vacated by the court and contestees.

10. Answers to interrogatories filed December 29, 1962, by contestors.

11. Reply with interrogatories attached in accordance with ruling of court and agreement of counsel for contestees, filed December 29, 1962, by contestors.

12. Motion to strike interrogatories filed January 9, 1963, by contestees.

13. Decision sustaining in part and overruling in part the contestors' demurrer to contestees' interrogatories, filed February 6, 1963, by the court.

14. Decision on contestees' motion to strike contestors' interrogatories filed February 14, 1963, by the court.

15. Interrogatories refiled February 25, 1963, by contestors.

16. Entry sustaining contestees' motion to strike contestors interrogatories of December 29, 1962, filed March 2, 1963, by the court.

17. Answer to contestors' interrogatories of February 25, 1963, filed March 14, 1963, by contestees.

18. A hearing date, for preliminary matters, set for March 20, 1963, by contestees.

19. Motion to dismiss contestors' petition for the reason that contestors had filed dilatory pleadings, filed March 20, 1963, by contestees.

20. Hearing date on motion to dismiss set for April 3, 1963, at hearing contestors moved orally for an immediate trial date.

21. Decision sustaining contestees' motion to dismiss filed April 9, 1963, by the court.

22. Entry sustaining contestees' dismissal motion filed April 25, 1963, without notice to contestors by contestees.

23. Motion to set aside the April 25th entry of dismissal filed May 13, 1963, by contestors.

24. Notice of appeal May 15, 1963, by contestors.

25. On May 22, 1963, a hearing and oral decision sustaining contestors' motion to set aside the April 25th entry of dismissal. At that time the court gave contestees permission to refile the entry of dismissal and granted contestors a hearing date for May 29, 1963, on contestors' oral motion to vacate the court's April 9th decision of dismissal.

26. Entry of dismissal filed May 22, 1963, by contestees.

27. Formal written motion to vacate the May 22nd entry of dismissal filed May 24, 1963, by contestees.

28. Hearing and oral decision on May 29, 1963, overruling contestors' motion to vacate the entry of dismissal and to set the election contest for a trial on its merits.

29. Second notice of appeal filed June 5, 1963, by contestors as the first notice of appeal May 15, 1963, was rendered premature by the later filing of the entry of dismissal on May 22, 1963.

30. Entry overruling motion to vacate filed June 12, 1963, by contestees.

31. Third notice of appeal filed June 29, 1963, as the second notice of appeal of June 5, 1963, was rendered premature by the later filing of the final entry in the matter below on June 12, 1963, by contestees.

32. Oral hearing on Motion for Leave to Appeal before the Ohio Supreme Court on December 3, 1963.

33. Entry of Ohio Supreme Court denying Motion for Leave to Appeal, December 11, 1963.

34. December 14, 1963, contestors-Appellants made application for a rehearing before the Ohio Supreme Court.

35. January 22, 1964, the Ohio Supreme Court denied the Application for Rehearing.

The Common Pleas Court of Warren County, Ohio, stated in granting to the Contestees-Appellees the right to submit written interrogatories to Contestors-Appellants that it was cognizant that the same were not authorized by the statutes governing election contests but that it was construing the statutes liberally to permit written interrogatories in the interest of an expeditious refinement of the issues. The court granted Contestors-Appellants until Friday, December 29, 1962, to file answers to interrogatories and the Contestees ten days following the filing of interrogatories by Contestors-Appellants to answer. The last day within the statutory period for a trial was Saturday, December 30, 1962.

VI. FEDERAL QUESTIONS RAISED AT FIRST OPPORTUNITY

Contestors-Appellants in their petition to contest the election alleged that the statutes authorizing said election were unconstitutional. This issue has not been passed on in the instant case as Contestors-Appellants have never been granted a trial upon the issues joined by their petition and the answer filed by Contestees-Appellees.

No violation of Contestors-Appellants rights to redress of wrongs committed against them occurred until such time as the Common Pleas Court of Warren County, Ohio, dismissed the election contest without permitting a trial of the issues. However, Contestors-Appellants orally raised the

due process issue in their argument before the Common Pleas Court in resistance to Contestees-Appellees' Motion to Dismiss.

This issue has been asserted at every subsequent stage of these proceedings. Contestors-Appellants asserted at pages seven and eight in their brief in Support of Motion For Leave to Appeal, filed in the Ohio Supreme Court, that the denial of Contestors-Appellants' right of their "day in court" was a deprivation of due process in contravention of the rights protected and guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 16, of the Ohio Constitution. Service of said brief was obtained on the 9th day of August, 1963.

In their Application for Rehearing filed December 14, 1963, Contestors-Appellants asserted at page three of said application that the Ohio Supreme Court in refusing to review the disposition of the instant case by the Common Pleas Court was compounding the deprivation of due process wrought upon the Contestors-Appellants by said Common Pleas Court.

VII. ARGUMENT FOR THE ALLOWANCE OF THIS PETITION FOR WRIT OF CERTIORARI

A. An Issue of Substance Not Previously Determined By This Court

The unique factual background of this case presents an issue under the "Due Process Clause" of the Fourteenth Amendment that has not been previously adjudicated by this Court. This matter is one that exemplifies the wisdom of this Court in declining to state a set of arbitrary standards of due process.

> This court has always declined to give a comprehensive definition of it (Due Process), and has preferred that its full meaning should be gradually ascertained

by the process of inclusion and exclusion in the course of the decisions of cases as they arise.

Twining v. *New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 54 L. Ed. 97 (1908)

Though many decisions have dealt with the issue of denial of due process, none can be uncovered dealing with a situation where a trial court and a state court of last resort have both denied to a party the right to be heard for a wrong inflicted, even though said right to hearing has been specifically granted by statute based upon a singular mandate of the State Constitution. Such is the situation in the instant case.

Nevertheless, this petition for certiorari is founded upon general principles of due process previously enunciated by this court and wholely applicable to the instant factual situation.

The grossness of the deprivation in this case explains the absence of analogous precedent.

B. The Decision of the Trial Court Contravenes Applicable Principles of Due Process

The Statement of the Case outlines the proceedings below in summary form. A cursory review of the Statement of the Case reveals that all the conditions and obligations placed upon the Contestors-Appellants by Sections 3515.08 through 3515.16 of the Ohio Revised Code have been met. This being true, the law of Ohio requires that a trial be held upon the issues joined. The Court found Contestors-Appellants did not have a trial within the 30-day period set by Section 3515.10 of the Ohio Revised Code and dismissed the case. The Court ignored the fact that Contestors-Appellants requested and were granted a trial date which the Court itself vacated. The Court by its own acts extended the pleading stage beyond the period provided by statute over the objection of Contestors-Appellants.

Daniel Webster in his argument in *Dartmouth College* v. *Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 689, set forth the broad outline of "law of the land" or "due process" when he said:

> By law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment *only after trial*. The meaning is that every citizens shall hold his life, liberty, property, and immunities under the protection of the general rules that govern society.

The principles of Webster were adopted with approval by this court in *Hurtado* v. *California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884), and *Truax* v. *Corrigan*, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921).

In *Hallinger* v. *Davis*, 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986, this court found the concept to apply generally to the whole of the United States and that the "law of the land" exists in each state.

Due Process guaranteed by the Constitution of the United States and the Ohio Constitution is not merely a relative term; it is an absolute right for the protection of the individual. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530. Notice, opportunity to be heard, opportunity to defend, orderly proceedings adapted to the nature of the case before a tribunal of competent jurisdiction are all essential elements of due process. (Numerous cases at 12 Am. Jur. § 573.) Due process is something more. Due process is the basic concept of our system of government by law. Law embodies due process and is something more than mere will exerted as an act of power. *Hurtado* v. *California*, *supra*. It is more than a political right, it is a legal right assertable in the courts. *State* v. *Henry*, 37 N. M. 536, 25 P. 2nd 204. To assert a legal right a litigant must have a right to his "day in court." This is the very essence of due process. *Pink* v.

A.A. Hwy. Express, 1941, 191 Ga. 302, Affirmed, 314 U. S. 201, 62 S. Ct. 241, 86 L. Ed. 142. A "day in court" necessarily means the right to a full and impartial hearing before a tribunal, with an opportunity to present evidence, and argument, and to examine and rebut the evidence and arguments of the opposition. It means the right to determine the issues on their merits. *In Re American Rio Grande Land & Irrigation Co.*, D. C. Tex. 1937, 21 F. Supp. 492, Cert. Denied, 308 U. S. 573, 60 S. Ct. 88, 84 L. Ed. 481; *Snyder* v. *Mass*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674; *Ex Parte Martin*, 1942, 139 O. S. 609, 41 N. E. 2nd 702; *Lyons* v. *Goldstein*, 290 N. Y. 19; *McCollam* v. *Birmingham Post Co.*, 1953, 259 Ala. 88. "Day in court" means a fair, open, and reasonable proceeding. *Calif.* v. *Pacific Gas & Electric Co.*, Cal. 1938, 30 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319; *Cox* v. *Armour Fertilizer Co.*, Fla. 1915, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027.

The rule of one full day in court includes appeal to the court of last resort of the jurisdiction. *Aero Design & Engineering Co.* v. *Oklahoma Employment Sec. Commission*, D. C. Okla. 1956, 151 F. Supp. 844, affirmed, 353 U. S. 943, 77 S. Ct. 824, 1 L. Ed. 2nd 855.

The above enumerated principles, extracted from the cited cases and affirmed by cases too numerous to enumerate, are fundamental. Yet, these precise fundamental rules of due process were ignored in this case. In essence, the trial court applied the principle of liberal construction to the election-contest statutes and caused the protraction of the pleading stage by vacating the trial date and permitting Contestees-Appellees to interject a procedural step not specified by statute. As a result the pleading stage, as enlarged by the court, extended beyond the time directed by statute for holding a trial on the merits. Contestees-Appellees moved for dismissal for failure to try the contest within the time limited by statute. The court then applied the principle of strict construction and said it had no choice

but to dismiss because a trial was not achieved within the time limited by statute.

Contestors-Appellants do not question the adequacy of the statutory remedy for contesting elections. It meets all the minimum constitutional requirements for due process. They are denied due process because they were judicially denied the right to avail themselves of that remedy. Due process is just as effectively denied by the unjust administration of the law by the judiciary as it is by the passing of unjust laws by the legislature.

The Ohio Supreme Court compounded this deprivation of due process by abrogating Section 21 of Article I of the Ohio Constitution which granted to the legislature the power ". . . to determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted." The legislature said in concise, plain language that "The person against whom a judgment is rendered in a contest of election may appeal on questions of law . . . to the Supreme Court. . . . Such appeals shall take precedence over all other causes upon the calendar, and *shall be set down for hearing* at the earliest convenient date." Section 3515.15, *Ohio Revised Code*. Nothing in this section could be construed to grant discretion to anyone but the "person against whom judgment is rendered." Yet the Ohio Supreme Court directed that the Contestors-Appellants must seek review by filing a Motion for Leave To Appeal. Without comment and upon a printed form entry the Ohio Supreme Court, as did the Common Pleas Court of Warren County, Ohio, denied the Contestors-Appellants their "day in court."

Some of the Contestors-Appellants are holders of liquor permits and owners of taverns now doing business in the Village of South Lebanon, Ohio. The Ohio Supreme Court has held that the continuance of a business, lawful at its inception, is a right within the protection of the Fourteenth Amendment. *Akron* v. *Chapman*, 160 O. S. 382. All the

Contestors-Appellants have been denied a free and fair election and the protection guaranteed by the law of the land: Ohio to correct the errors in said election. Each of the permit holders suffers the additional loss of his business and livelihood without compensation and without due process.

VIII. CONCLUSION

The two principles most important to democracies are at issue in this case: the right to vote in a fair election and to have the vote fairly counted; and the right to redress of grievances by due process of law. Neither principle can long stand without the protection of the other. These principles separate us from the opposite poles of anarchy and totalitarianism. The deprivation of due process in this case is no less because it was wrought by the judiciary rather than the legislative or executive branch of our government.

IX. PRAYER

WHEREFORE, Contestors-Appellants pray that the judgment of the Common Pleas Court of Warren County, Ohio, be reversed and a mandate issued requiring this case be docketed forthwith for trial upon its merits.

Respectfully submitted,

SCOTT H. RAY, JR.
8 S. Broadway
Lebanon, Ohio

LOUIS C. CAPELLE
505 Walnut Street
Cincinnati, Ohio
Attorneys for Petitioners

APPENDIX

APPENDIX A.

Filed April 9, 1963

IN THE COMMON PLEAS COURT
COUNTY OF WARREN, STATE OF OHIO

Case No. 25201

NELSON BRYANT, et al.,

Plaint

v.

CHARLES K. MOORE, et al.,

Defenda

DECISION

YOUNG, J.

This matter is before the Court on the motion of contestees to dismiss the contest for the reason that same has not been heard within the time specified statute.

Both contestees and contestors cite the case of *Jenkin Hughes*, 157 O. S. 186, and in addition contestees *McCall* v. *Board of Education*, 169 O. S. 50 and *William O'Neill*, 142 O. S. 467.

The syllabi in the McCall case are both strongly fa able to contestees' position in this case. The first sylla stating that the prescribed procedure must be strictly lowed and the second indicating that where "the hea was not set in compliance with the statute, that no req for the setting of such hearing was made . . . the ju with whom the petition was filed HAS NO ALTER

TIVE but to dismiss the same, on motion of the contestee, for lack of jurisdiction and authority to proceed."

While a careful reading of the decision may raise some doubts as to whether the strong language in the second syllabus is warranted, nevertheless, that is the real import of the decision.

The decision also disposes of the question of the role and responsibility of the Court in connection with the prescribed statutory steps with this language, "but some duty devolves upon the contestor, who inaugurates the contest, to see that this is accomplished."

The file in this matter fails to indicate that the contestors have, at any time, requested that the contest be set for trial and indeed the record indicates that "interrogatories of contestors" were filed by contestors on February 25, 1963, some eighty seven (87) days after the filing of the contest.

It is therefor the decision of the Court that upon the cited authority requiring strict construction of the statutes involved that the motion of contestees must be sustained.

Counsel for contestees may prepare an entry conforming to this decision, providing for the dismissal of the action at contestors' expense and reserving their exceptions to this decision.

APPENDIX B

Filed April 25, 1963
IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

No. 25201

NELSON BRYANT, et al., *Contestors,*

v.

CHARLES K. MOORE, et al., *Contestees.*

ENTRY

This cause came on to be heard on 3 April, 1963, upon the Motion of the Contestees to dismiss this contest for the reason that the same has not been heard within the time specified by statute, the Memorandum filed with said Motion and upon arguments of counsel for both Contestors and Contestees.

Upon consideration whereof, the Court finds that said motion is well taken and that the same should be sustained.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that this cause be, and the same is hereby, dismissed at the cost of the Contestors.

To all of which Contestors except.

Judge

FILED
1963 Apr 25 AM 8:41
C. C. BECKETT
Clerk of Courts
Warren County, Ohio
Refiled as of May 22, 1963
GEO. H. ELLIOT, *for Defts.*
SCOTT H. RAY, JR., *Atty. for Contestors*

APPROVED:

Attorney for Contestors

Attorneys for Contestees

FILED
1963 May 22 AM 9:32
C. C. BECKETT
Clerk of Courts
Warren County, Ohio

APPENDIX C

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

No. 25201

NELSON BRYANT, et al., *Contestors,*

v.

CHARLES K. MOORE, et al., *Contestees.*

ENTRY

This cause came on to be heard on 29 May, 1963, upon the Motion of the Contestors for the vacation of the Entry of Dismissal filed herein on 22 May, 1963, and for an assignment of this cause for trial on the merits, and upon the evidence and the arguments of counsel.

Upon consideration whereof, the Court, being fully advised in the premises, finds that said Motion is not well taken and that the same should be denied in its entirety.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the Motion of Contestors for vacation of the previous Entry of Dismissal herein and for assignment of this cause for trial be, and the same are hereby, overruled.

To all of which Contestors except.

Judge

APPROVED:

Attorney for Contestors

Attorneys for Contestees

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

1963 TERM

To wit: Wednesday, December 11, 1963

THE STATE OF OHIO
CITY OF COLUMBUS

No. 38356

NELSON BRYANT, et al., *Appellants,*

v.

CHARLES K. MOORE, et al., *Appellees.*

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF COMMON PLEAS FOR WARREN COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Scott H. Ray, Jr.

I, John W. McMillan, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19...
.....Clerk
.....Deputy

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

CITY OF COLUMBUS
THE STATE OF OHIO

No. 38356

NELSON BRYANT, et al., *Appellants,*

v.

CHARLES R. MOORE, et al., *Appellees.*

REHEARING

It is ordered by the Court that rehearing in this case is denied.

I, Thomas L. Sartzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said court, to wit, from Journal No. . . . , Page . . . .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this . . . . . day of . . . . . , 19 . . . .

. . . . . Clerk.

By . . . . . Deputy.

Office Supreme Court, U.S.
FILED
APR 16 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 969
Oct. Term, 1963

NELSON BRYANT, et al.,
Petitioners,

v.

CHARLES K. MOORE, et al.,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

GEORGE H. ELLIOTT
702 First National Bank Building
Middletown, Ohio

J. T. RILEY
313 South Main Street
Franklin, Ohio
Attorneys for Respondents

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

INDEX

PAGE

I. The Decision of the Supreme Court of Ohio Was Not Necessarily Based Upon a Federal Question 1

II. The Construction Placed Upon Ohio Statutes by the Supreme Court of Ohio Is Controlling in This Appeal 3

III. Construction of Ohio Election Contest Statutes by the Supreme Court of Ohio 4

IV. The Dismissal of the Election Contest by the Common Pleas Court Was Not a Denial of Due Process of Law 6

V. Contestors-Appellants Had No Appeal as of Right to the Supreme Court of Ohio Under Ohio Law 9

VI. Conclusion 10

VII. Prayer 11

TABLE OF CASES

Aero Mayflower Transit Co. v. Railroad Com'n'rs, 332 U. S. 495, 92 L. ed. 99, 68 S. Ct. 167 9

Beal v. Missouri P. R. Corp., 312 U. S. 45, 85 L. ed. 577, 61 S. Ct. 418 4

Breisch v. Central R. Co., 312 U. S. 484, 85 L. ed. 964, 61 S. Ct. 662, 132 A. L. R. 918 4

Ellis v. Dixon, et al., 349 U. S. 458, 99 L. ed. 1231, 75 S. Ct. 850 3

Lauf v. E. G. Shinner & Co., 303 U. S. 323, 89 L. ed. 872, 58 S. Ct. 578 4

State of Minnesota v. National Tea Company, 309 U. S. 551, 84 L. ed. 920 2

Stembridge v. State of Georgia, 343 U. S. 541, 95 L. ed. 1130, 72 S. Ct. 834 3

PAGE

Trust Company of Chicago, Adm'r v. Pennsylvania R. Co., 183 F. (2d) 340, 21 A. L. R. (2d) 238 .. 4

Bees v. Gilronan, 159 O. St. 186, 50 O. Ops. 149, 111 N. E. (2d) 395 10

Duncan v. Pogue, 126 O. St. 377, 185 N. E. 553 10

Foraker v. Board of Education, 130 O. St. 243, 4 O. Ops. 264, 199 N. E. 74 10

Jenkins v. Hughes, 157 O. St. 186, 105 N. E. (2d) 58, 47 O. Ops. 127 5

McCall v. Board of Education, 169 Ohio St. 50, 8 O. Ops. (2d) 11 ..... 6, 8

Young v. Fielder, 159 O. St. 184, 50 O. Ops. 149, 111 N. E. (2d) 394 10

TEXTS

American Jurisprudence 4

Lawyers Edition, Volume 84 (Annotation) 2

STATUTES

Ohio Revised Code Sections

2505.29 10

3515.09 4

3515.10 ..... 4, 6

3515.11 ..... 4, 6

3515.15 ..... 4, 9

Identification of Parties: Throughout this Brief, the parties are designated as they were in the Petition for Writ of Certiorari:

Petitioners: Contestors-Appellants

Respondents: Contestees-Appellees

IN THE

Supreme Court of the United States

No. 969

Oct. Term, 1963

NELSON BRYANT, et al.,

Petitioners,

v.

CHARLES K. MOORE, et al.,

Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

I. THE DECISION OF THE SUPREME COURT OF OHIO WAS NOT NECESSARILY BASED UPON A FEDERAL QUESTION.

On 1 August, 1963, Contestors-Appellants filed their Motion for Leave to Appeal to the Supreme Sourt of Ohio from the decision of the Court of Common Pleas of Warren County, Ohio, dismissing thi election contest. On 9 August, 1963, the Contestors-Appellants filed an extensive Brief in support of their Motion for Leave to Appeal and, on 26 August, 1963, the Contestees-Appellees filed their Brief opposing the Motion for Leave to Appeal. On 3 December, 1963, oral arguments on the Motion for Leave to Appeal were heard by the Supreme Court of Ohio. On 11 December, 1963, the Supreme Court of Ohio overruled the Motion

for Leave to Appeal, without opinion. On 14 December, 1963, Contestors-Appellants applied to the Supreme Court of Ohio for a re-hearing on their Motion for Leave to Appeal, and, on 22 January, 1964, the Supreme Court of Ohio denied re-hearing in this case, without opinion.

The Supreme Court of the United States has jurisdiction to review a judgment or decree of a State Court on appeal only where that judgment or decree determines a federal question. If the decision of a State Court upon a non-federal ground or a point of local or general law is sufficient to support the judgment, leaving no federal question open for determination by the Supreme Court, an appeal is not warranted, and if taken will be dismissed. Further, the Supreme Court of the United States will decline to review, on certiorari to a state court, a question asserted to arise under the Constitution of the United States where, because of uncertainty of the precise grounds of the decision rendered by the State Court, a review of the constitutional question is not clearly necessary to a decision of the case. *State of Minnesota* v. *National Tea Company*, 309 U. S. 551, 84 L. ed. 920. It is settled that in order to justify the United States Supreme Court in reviewing the judgment or decree of a State Court, *the record must show that the judgment rested upon the disposition of a federal question.* Jurisdiction cannot be founded upon a mere surmise that the decision of the State Court turned upon a federal question. It must appear from the record, affirmatively or by fair implication, that the decision of the federal question was necessary to the determination of the cause. See annotation in 84 L. ed. 925, et. seq., and cases cited therein.

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. (Emphasis by the Court) . . . We are without jurisdiction when the

> question of the existence of an adequate state ground is debatable." *Stembridge* v. *State of Georgia*, 343 U. S. 541, 95 L. ed. 1130, 72 S. Ct. 834.

In *Ellis* v. *Dixon, et al.*, 349 U. S. 458, 99 L. ed. 1231, 75 S. Ct. 850, this Court held:

> "New York Court of Appeals denied petitioners motion for leave to appeal without stating any grounds for its decision. 306 N. Y. 981. In these circumstances, we must ascertain whether that Court's decision, 'might' have rested on a non-federal ground, for if it did we must decline to take jurisdiction. *Stembridge* v. *State of Georgia*, 343 U. S. 541, 547, 96 L. ed. 1130, 1133, 72 S. Ct. 834 (1952); see also *Lynch* v. *New York*, 293 U. S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16 (1934)."

In the case under consideration, it is quite probable that the Supreme Court of Ohio, in overruling the Motion for Leave to Appeal, based its decision upon a non-federal ground. It is most likely that the Supreme Court of Ohio overruled the Motion for Leave to Appeal on the basis that the election contest was properly dismissed by the Common Pleas Court because the procedure prescribed by state law for election contests was not followed. The very fact that the Supreme Court of Ohio did not deem it necessary to state the grounds for its decision strongly indicates that it was in accord with the Decision of the Common Pleas Court of Warren County and the grounds stated therein.

As the decision of the Supreme Court of Ohio may reasonably have been based upon a non-federal ground, this Court is without jurisdiction to review the same on appeal.

II. THE CONSTRUCTION PLACED UPON OHIO STATUTES BY THE SUPREME COURT OF OHIO IS CONTROLLING IN THIS APPEAL.

Upon the construction of the Constitution and the laws of a state, the Federal courts as a general rule, have always

followed the decisions of the highest court of the state unless they conflict with, or impair the efficacy of, some principle of the Federal Constitution or of a Federal statute. The Supreme Court of the United States has no authority to inquire into the grounds and reasons on which the highest court of a state proceeded in its construction of the statutes and Constitution of that state. See 14 Am. Jur. 313, and the cases cited therein.

Federal courts are bound by a construction put upon a state statute by the highest court of the state. *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 89 L. ed. 872, 58 S. Ct. 578. The state courts are the final arbiters of the meaning and appropriate application of state statutes, subject only to review by the Supreme Court of the United States if such construction or application is appropriately challenged on constitutional grounds. *Beal* v. *Missouri P. R. Corp.*, 312 U. S. 45, 85 L. ed. 577, 61 S. Ct. 418. Unless it obviously depends altogether on a misconception of Federal law, a fixed interpretation of a state statute should be accepted by the Federal courts. *Breisch* v. *Central R. Co.*, 312 U. S. 484, 85 L. ed. 964, 61 S. Ct. 662, 132 A. L. R. 918.

The United States Court of Appeals, Seventh Circuit, in *Trust Company of Chicago, Adm'r* v. *Pennsylvania R. Co.*, 183 F. (2d) 340, 21 A. L. R. (2d) 238, held:

> "A federal court will follow and accept as correct the decisions of the highest court of a state as to the powers and the extent of the jurisdiction of the courts of that state."

III. CONSTRUCTION OF OHIO ELECTION CONTEST STATUTES BY THE SUPREME COURT OF OHIO.

The pertinent provisions of Ohio law relating to election contests are set forth in Sections 3515.09, 3515.10, 3515.11 and 3515.15, Ohio Revised Code. These statutes are quoted in full on pages 5, 6, and 7, of the Petition for Writ of

Certiorari herein. The Contestors-Appellants make no claim that said statutes, or any of them, violate either the Constitution of Ohio or the Constitution of the United States.

The Supreme Court of Ohio has interpreted the election contest statutes on numerous occasions. Without exception, the Supreme Court of Ohio has held that such statutes must be strictly construed and the procedures specified therein scrupulously complied with. One of the best statements of the position of the Supreme Court of Ohio is contained in *Jenkins* v. *Hughes*, 157 O. St. 186, 105 N. E. (2d) 58, 47 O. Ops. 127, viz.:

> ". . . Sections 4785.168 and 4785.169, General Code (now Sections 3515.10 and 3515.11, R. C., respectively), relate to contests of elections wherein the Common Pleas Court acts not in a judicial capacity but in a political administrative capacity with its authority and procedure therefore specifically authorized and provided by statute. *McClintock* v. *Sweitzer*, 138 Ohio St., 324 20 O. O. 383, 34 N. E. (2d) 781; *Link* v. *Karb, Mayor*, 89 Ohio St., 326, 104 N. E. 632; *State, ex rel. Shriver, County Engineer* v. *Hayes*, 148 O. St. 681, 36 O. O. 277, 76 N. E. (2d) 869.
>
> "The courts have no jurisdiction to conduct an election contest in the absence of statutory authority therefor. *State, ex rel.* v. *Harmon*, 31 Ohio St. 250; *Link* v. *Karb, Mayor*, supra; *State, ex rel. Kautzman* v. *Graves, Secy. of State*, 91 Ohio St. 113, 110 N. E. 185; *Thompson* v. *Redington*, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918A, 1161; and *Williams* v. *O'Neill*, 142 Ohio St., 467, 27 O. O. 400, 52 N. E. (2d) 858.
>
> "This court has held that the election statutes of the state must be strictly construed. *Williams* v. *O'Neill*, supra; *Foraker* v. *Perry Township Rural School District Board of Education*, 130 Ohio St. 243, 4 O. O. 264, 199 N. E. 74. Election contests are special and summary in nature, and the procedure prescribed by statute to bring an election contest within the jurisdic-

tion of specified authority must be strictly observed. *Williams* v. *O'Neill*, supra, *Ingerson* v. *Marlow*, 14 Ohio St. 568. In fact, the only authority which the Court has in an election contest is derived from the statutes."

* * * * *

"The public interest in having election contests speedily determined requires promptitude. Prompt action in hearing and determining election contests so as to end a status effected by an election contest or to terminate a holdover office—occupancy before a term has wholly or in great part expired seems to be the policy of the law. *English* v. *Dickey*, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40; *Walton* v. *Olson*, 40 N. D. 571, 170 N. W. 107; *Whitney* v. *Blackburn*, 17 Ore. 564, 21 P. 874, 11 Am. St. Rep. 857. And a provision for the commencement of the contest within a designated time is usually regarded as mandatory (*Vailes* v. *Brown*, 16 Colo. 462, 27 P. 945, 14 L. R. A. 120) and must be complied with in order to confer jurisdiction in the case. Furthermore, *where a contester, before the expiration of the time within which an election contest under a statute must be tried, obtains a postponement, or acquiesces in a postponement which carries the case beyond the time limit, he thereby discontinues his contest. English* v. *Dickey*, supra." *Jenkins* v. *Hughes*, 157 Ohio St. 186, 47 Ohio Ops. 127, 105 N. E. (2d) 58. (Emphasis added.)

See also *McCall* v. *Board of Education*, 169 Ohio St. 50, 8 O. Ops. (2d) 11.

IV. THE DISMISSAL OF THE ELECTION CONTEST BY THE COMMON PLEAS COURT WAS NOT A DENIAL OF DUE PROCESS OF LAW.

Sections 3515.10 and 3515.11, Ohio Revised Code, which are quoted in full on pages 5 and 6 of the Petition for Certiorari herein, prescribe a thirty day time limit after the filing of the petition in an election contest within which

such contest must be heard. Such statutes also specify conditions upon postponements or adjournments of such hearing, and prescribe that the hearing shall not be extended more than thirty days.

The Court of Common Pleas of Warren County, Ohio, dismissed this election contest for the reason that the same had not been heard within the time prescribed by law. Contestors-Appellants do not question the adequacy of the statutory remedy for contesting elections, conceding that this remedy meets the constitutional requirements for due process. It is the contention of Contestors-Appellants that they have been denied due process by reason of the dismissal of the action, notwithstanding the fact that the Common Pleas Court specifically found that the Contestors-Appellants had failed to comply with the mandatory requirements of the statutes.

The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause. 12 Am. Jur. 267, et seq. The election contest statutes of Ohio afford an opportunity to be heard. In this case, the Contestors-Appellants have failed to take advantage of the opportunity afforded them by statute. One who fails to avail himself of the opportunity to be heard when the same is afforded him, cannot be heard to complain that he was denied due process.

The Journal Entry of the Common Pleas Court dismissing the contest (see Appendix B, page 3A, of the Petition herein), recites: "This cause came on to be heard on 3 April, 1963, upon the Motion of the Contestees to dismiss the contest for the reason that the same has not been heard within the time specified by statute, the Memorandum filed with said Motion and upon arguments of counsel for both Contestors and Contestees." As Contestors-Appellants point out on page 12 of their Petition, two hearings were held

on the Motion to Dismiss, at which time counsel for Contestors-Appellants were heard in full in opposition to the Motion.

Subsequent to the first hearing on the Motion to Dismiss, the Common Pleas Court filed a written Decision, which is set forth in Appendix A, page 1A, of the Petition herein finding, in part: "The file in this matter fails to indicate that the Contestors have, at any time, requested that the contest be set for trial and indeed the record indicates that 'Interrogatories of Contestors' were filed by Contestors on February 25, 1963, some eighty-seven (87) days after the filing of the contest. It is, therefore, the decision of the Court that upon the cited authority requiring strict construction of the statutes involved, that the motion of the Contestees must be sustained." Although two hearings were held subsequent to the rendition of this decision on Contestors-Appellants' motion to vacate the entry of dismissal, nothing was presented which would warrant the Court in changing its findings as set forth in its decision. The Common Pleas Court, having found that the Contestors-Appellants had failed to comply with the applicable statutes, had no jurisdiction to proceed further to hear the election contest. *McCall* v. *Board of Education*, 169 O. St. 50, 8 O. Ops. (2d) 11.

The Supreme Court of Ohio, having before it the record of the proceedings below, including the Decision of the Common Pleas Court, and after having considered extensive Briefs by both sides and the arguments of counsel for both Contestors-Appellants and Contestees-Appellees, affirmed the Court of Common Pleas without opinion.

This election contest was dismissed for noncompliance with the mandatory provisions of the Revised Code of Ohio regarding the manner of conducting election contests. Such dismissal was in accord with well settled principles of Ohio law. The Contestors-Appellants were provided with an op-

portunity to be heard on the merits by the procedures provided by statutes; the dismissal of the contest does not constitute a denial of due process of law when Contestors-Appellants fail to avail themselves of such opportunity within the time prescribed by law.

V. CONTESTORS-APPELLANTS HAD NO APPEAL AS OF RIGHT TO THE SUPREME COURT OF OHIO UNDER OHIO LAW.

Contestors-Appellants further claim that they were denied due process of law in that the Supreme Court of Ohio refused to admit their appeal and to grant them a full hearing on the merits. Contestors-Appellants contend that they had an appeal as of right to the Supreme Court of Ohio, and that they should not have been required to first obtain leave to appeal.

Apparently, this contention of Contestors-Appellants is of recent origin. Contestors-Appellants, without complaint, filed a Motion for Leave to Appeal to the Supreme Court of Ohio in August, 1963. They did not attempt to file an appeal as of right in the Supreme Court of Ohio. The first time that Contestors-Appellants claimed an appeal as of right was in their Application for Re-hearing in the Supreme Court of Ohio, filed in December, 1963. In any event, it is the well settled law of Ohio that leave to appeal must first be had in the Supreme Court of Ohio. As has been pointed out previously in this Brief, the Supreme Court of the United States not only accepts, but is bound by the construction given to state statutes by state courts. *Aero Mayflower Transit Co.* v. *Railroad Com'n'rs*, 332 U. S. 495, 92 L. ed. 99, 68 S. Ct. 167.

Section 3515.15, Ohio Revised Code, provides for an appeal on questions of law in an election contest to the Supreme Court of Ohio. This statute is quoted in full on pages 6 and 7 of the Petition herein. This statute provides

in part: "The laws and rules of the court governing appeals apply in the appeal of contested election cases."

Among those laws is Section 2505.29, Ohio Revised Code, which reads:

> "No appeal shall be filed in the supreme court unless such court or a judge thereof grants leave to file such an appeal. Such leave need not be obtained to file an appeal as to the judgment or final order of the court of appeals, or a judge thereof, in cases involving questions under the constitution of the United States, or of this state, in cases which originated in the court of appeals, and as to proceedings of administrative officers as may be provided by law."

In each and every case where an appeal was taken directly to the Supreme Court of Ohio in an election contest, without first obtaining leave to appeal, the Supreme Court of Ohio, on motion, dismissed the appeal. See *Young* v. *Fielder*, 159 O. St. 184, 50 O. Ops. 149, 111 N. E. (2d) 394; *Bees* v. *Gilronan*, 159 O. St. 186, 50 O. Ops. 149, 111 N. E. (2d) 395; *Foraker* v. *Board of Education*, 130 O. St. 243, 4 O. Ops. 264, 199 N. E. 74; *Duncan* v. *Pogue*, 126 O. St. 377, 185 N. E. 553.

VI. CONCLUSION.

There is no Federal question of substance presented by this appeal. The decisions of the Ohio courts are supported by fixed principles and construction of Ohio law. The dismissal of the election contest was based upon noncompliance with statutory requirements. Contestors-Appellants failed to avail themselves of the opportunity to be heard which the Ohio statutes provided. There is no question that the Contestors-Appellants not only "acquiesced in" continuances, postponements and delays, they actively caused them by their own conduct. The Contestors-Apellants, having initiated the action, are under a duty to proceed with the

case and to take affirmative steps to comply with the procedural requirements of the law. Dismissal of this election contest, under the circumstances of this case, did not violate any constitutional right of Contestors-Appellants.

VII. PRAYER.

WHEREFORE, Contestees-Appellees pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

GEORGE H. ELLIOTT
702 First National Bank Building
Middletown, Ohio

J. T. RILEY
313 South Main Street
Franklin, Ohio

Attorneys for Respondents

Office Supreme Court, U.S.
FILED
JUN 3 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 969

NELSON BRYANT, et al.,

Petitioners,

v.

CHARLES K. MOORE, et al.,

Respondents.

APPLICATION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

SCOTT H. RAY, JR.
8 S. Broadway
Lebanon, Ohio

LOUIS C. CAPELLE
505 Walnut Street
Cincinnati, Ohio
Attorneys for Petitioners.

THE JOHNSON & HARDIN CO. LAW PRINTERS
CINCINNATI, OHIO

INDEX

	PAGE
I. Petition for Writ of Certiorari Denied	1
II. Denial A Gross Error and Miscarriage of Justice	1
III. The Issue Appears on the Face of the Record	2
IV. Deprivation of A Hearing Provided By Law Deprives one of Due Process of Law	3
V. This Appeal is Not a Political Question Beyond the Court's Purview	3
VI. Due Process and Republican Form of Government Are Corollary Principles of Democracy	3
Conclusion	4
Certificate	5
Appendix A	6
Appendix B	8

IN THE

Supreme Court of the United States

No. 969

NELSON BRYANT, et al., *Petitioners,*

v.

CHARLES K. MOORE, et al., *Respondents.*

APPLICATION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

I. Petition For Writ of Certiorari Denied

On May 20, 1964, Petitioners received notice from the clerk that their Petition had been denied on May 18, 1964. As in the Supreme Court of Ohio, the notice did not specify any reason for the denial.

II. Denial A Gross Error and Miscarriage of Justice

All that Petitioners have sought in the multifarious proceedings now past is the opportunity to seek redress of their grievances in a court of law as provided by law. Petitioners in seeking redress have not only complied with the spirit of the law but also to the literal letter of the law.

The law in question[1] provides for redress of grievances upon petition. However, though petitioners have petitioned according to the applicable law they have not received redress nor even a hearing upon the grievances for which they seek redress. Their attempts to seek review from the appellate courts of the alleged injustices have been equally unrewarding.

III. The Issue Appears on the Face of the Record

The Warren County Common Pleas Court stated that Petitioners had failed at any time to set the matter for trial and as a result the matter was not heard within the time specified by statute and therefore Respondents were entitled to a dismissal.[2]

This finding by the court is untrue, it is erroneous and is shown to be erroneous upon the face of the record contained in this appeal.[3] Scott H. Ray, Jr., Attorney for Petitioners, prepared an entry ordering service of the Petition upon Contestees and setting the election contest for trial on a day certain. Simultaneous to the filing of the petitions, Scott H. Ray, Jr., requested of the Assignment Commissioner a trial date and upon securing said date filled it in upon the entry and took said entry to Common Pleas Judge Warren C. Young for signature. Upon securing Judge Young's signature, Scott H. Ray, Jr., filed the entry and service of the petition along with copies of the entries setting the matter for trial were served on December 5, 1962. At no time thereafter did petitioners request a continuance or were they ever granted one.

Each of the aforegoing statements is verified by the record in this cause.

---

[1] Section 4515.09 et seq. of the Ohio Revised Code.
[2] See Underlined sentences in Appendix A.
[3] See Appendix B.

IV. Deprivation of A Hearing Provided By Law Deprives one of Due Process of Law

Without fault of their own Petitioners have been deprived of their statutory right to contest the election result. Due process of law requires orderly proceedings for redress of grievances and that the courts honor all valid obligations for the conducting of proceedings placed upon it by the legislature.

When the court erroneously refuses to permit a party to have the hearing provided by law it deprives the party of due process of law.

V. This Appeal is Not a Political Question Beyond the Court's Purview

Once the right to redress of grievance arising out of an election has been created and the authority to adjudicate the grievance has been conferred, then the proceedings for redress of grievance has become a judicial matter and certainly within the protection of Due Process provision of the Constitution.

VI. Due Process and Republican Form of Government Are Corollary Principles of Democracy

The Republican form of government guaranteed by Article IV, Section 4, guarantees the use of the ballot within our form of government. The protection of the voting system is a legitimate exercise of legislative powers.

Without the vote change can be wrought only by governmental fiat or revolution of the people.

When the justice of the voting process is questioned proceedings must be provided to reconcile conflicting claims. When such a process is provided but in practice denied to some, then no orderly means to achieve justice remains. When one is no longer able to achieve redress of grievances by rule of law then the society is destined for totalitarianism or anarchy.

CONCLUSION

Greater specification in this application for rehearing is not possible as we have no inkling of the court's reasoning in denying the original petition.

Is the issue of denial of Due Process of Law, by denying Petitioners a hearing on the merits of their complaint which among other things alleges a denial of constitutional rights, a matter of such little importance that it can be written off by the Ohio Supreme Court and the Supreme Court of the United States with the simple phrase "your petition for hearing is denied?" Are the issues raised and the allegations made so inconsequential that petitioners are entitled to no more than this from our highest courts?

Are Petitioners loses—of the right to a just election, and the right to engage in a lawful occupation—too slight to warrant the attention of the courts of last resort?

Certainly this court must answer the above questions in the negative. Having answered the questions in the negative it must bring this case before it for review by allowance of the Petition for Writ of Certiorari.

Respecfully submitted,

SCOTT H. RAY, JR.
8 S. Broadway
Lebanon, Ohio

LOUIS C. CAPELLE
505 Walnut Street
Cincinnati, Ohio
Attorneys for Petitioners.

CERTIFICATE

I, Scott H. Ray, Jr., one of the counsel for Petitioners hereby certify this Application For Rehearing is presented in good faith and not for the purposes of delay and upon the belief that the same is required in order to obtain substantial justices in the within cause and further in an attempt to have this case heard for the first time on its merits.

/s/ SCOTT H. RAY, JR.
SCOTT H. RAY, JR.

APPENDIX A

(Filed April 9, 1963)

IN THE COMMON PLEAS COURT
COUNTY OF WARREN, STATE OF OHIO

Case No. 25201

NELSON BRYANT, et ak, *Plaintiff,*

v.

CHARLES K. MOORE, et al., *Defendant.*

DECISION

YOUNG, J.

This matter is before the Court on the motion of the contestees to dismiss the contest for the reason that the same has not been heard within th time specified by statute.

Both contestees and contestors cite the case of *Jenkins* v. *Hughes*, 157 O. S. 186, and in addition contestees cite *McCall* v. *Board of Education*, 169 O. S. 50 and *Williams* v. *O'Neill*, 142 O. S. 467.

The syllabi in the *McCall* case are both strongly favorable to contestees' position in this case. The first syllabus stating that the prescribed procedure must be strictly followed and the second indicating that where "the hearing was not set in compliance with the statute, that no request

for the setting of such hearing was made . . . , the judge with whom the petition was filed HAS NO ALTERNATIVE but to dismiss the same, on motion of the contestee, for lack of jurisdiction and authority to proceed."

While a careful reading of the decision may raise some doubts as to whether the strong language in the second syllabus is warranted, nevertheless, that is the real import of the decision.

The decision also disposes of the question of the role and responsibility of the Court in connection with the prescribed statutory steps with this language, "but some duty devolves upon the contestor, who inaugurates the contest, to see that this is accomplished."

The file in this matter fails to indicate that the contestors have, at any time, requested that the contest be set for trial and indeed the record indicates that "interrogatories of contestors" were filed by contestors on February 25, 1963, some eighty seven (87) days after the filing of the contest. (Emphasis added)

It is therefore the decision of the Court that upon the cited authority requiring strict construction of the statutes involved that the motion of contestees must be sustained.

Counsel for contestees may prepare an entry conforming to this decision, providing for the dismissal of the action at contestors' expense and reserving their exceptions to this decision.

APPENDIX B

STATE OF OHIO, WARREN COUNTY
COURT OF COMMON PLEAS

Case No. 25201

NELSON BRYANT, et al., *Contestors,*

v.

CHARLES K. MOORE, et al., *Contestees.*

ENTRY

Whereas, a Petition has been filed in the within matter to contest the election of certain Questions and Issues in South Lebanon, Ohio, and whereas, certain persons are enumerated as Contestees, it is ordered, adjudged and decreed: That the Clerk of this Court shall cause copies of Contestors' Petition and this Entry to be served upon the Contestees namely:

Charles K. Moore
125 King Avenue, South Lebanon, Ohio;
Mervin Rudd
335 Pleasant Street, South Lebanon, Ohio;
Marvin Byrd
29 Pleasant Drive, South Lebanon, Ohio;
H. C. Smith
350 Pleasant Drive, South Lebanon, Ohio; and
Pearl Burns
360 Section Street, South Lebanon, Ohio.

in the same manner as a summons in a civil action, notifying them of the filing of the Petition and that they shall have ten (10) days from the time service has been made upon them in which to answer the Petition, and that said Petition will come on for hearing on the *19th*[1] day of December, 1962, at 9:00 o'clock A.M. at the Court House in Lebanon, Ohio.

/s/ WARREN C. YOUNG
Judge

s/ SCOTT H. RAY, JR.
SCOTT H. RAY, JR.
Attorney for Contestors

---

[1] 19th is handwritten in the original.